86-1252

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
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No. 86-_____

In The

Supreme Court of the United States

October Term 1986

WILLIAM D. O'KELLEY, DONNA O'KELLEY KILGORE, and PATRICIA WILLIAMS, as mother and next friend of CAROL A. O'KELLEY and CHRISTOPHER T. O'KELLEY, minors,

Appellants

v.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, d/b/a GWINNETT AMBULANCE SERVICE, METRO AMBULANCE SERVICES, INC., CARLSON SOUTHEAST CORP., ESTHER REIFMAN,

Appellees.

On Appeal From The Supreme Court Of The State of Georgia

JURISDICTIONAL STATEMENT

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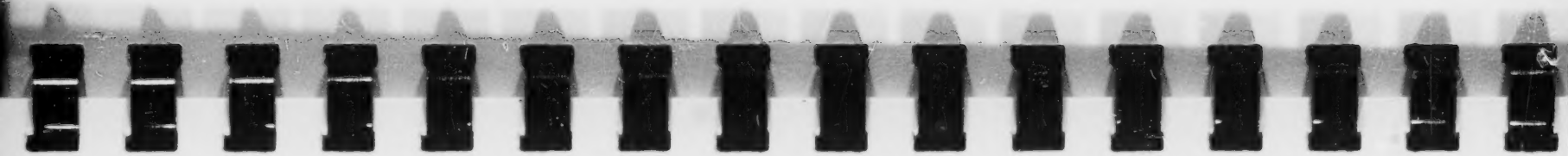
QUESTIONS PRESENTED

This case involves a challenge to the validity of OCGA §51-4-2, a provision of the Georgia Wrongful Death Act. It vests the right to maintain a wrongful death action exclusively in the surviving spouse if a decedent has one. The surviving spouse sues in behalf of his or her own interests as well as in a representative capacity on behalf of all the decedent's children. The surviving spouse must share any recovery with the children based on a formula set forth in OCGA §51-4-2(d). In the present case, Daisy O'Kelley survived the decedent, William Harold O'Kelley. She was his third wife. She is not the mother of any of his four children, two of whom are still minors. All of the decedent's children joined in filing the wrongful death action below. The defendants, however, successfully argued that under OCGA §51-4-2 only Daisy O'Kelley was authorized to maintain the instant wrongful death action. The trial court accordingly granted their motion for summary judgment. As of the submission of this juris-

dictional statement, Daisy O'Kelley has not filed the wrongful death action that only she is empowered to bring. The two year statute of limitations will bar suit under OCGA §51-4-2 as of May 27, 1987. Appellants thus are in jeopardy of losing their substantial property interest -- recognized as such by Georgia case law -- to share in a damages recovery reflecting the full value of their father's life.

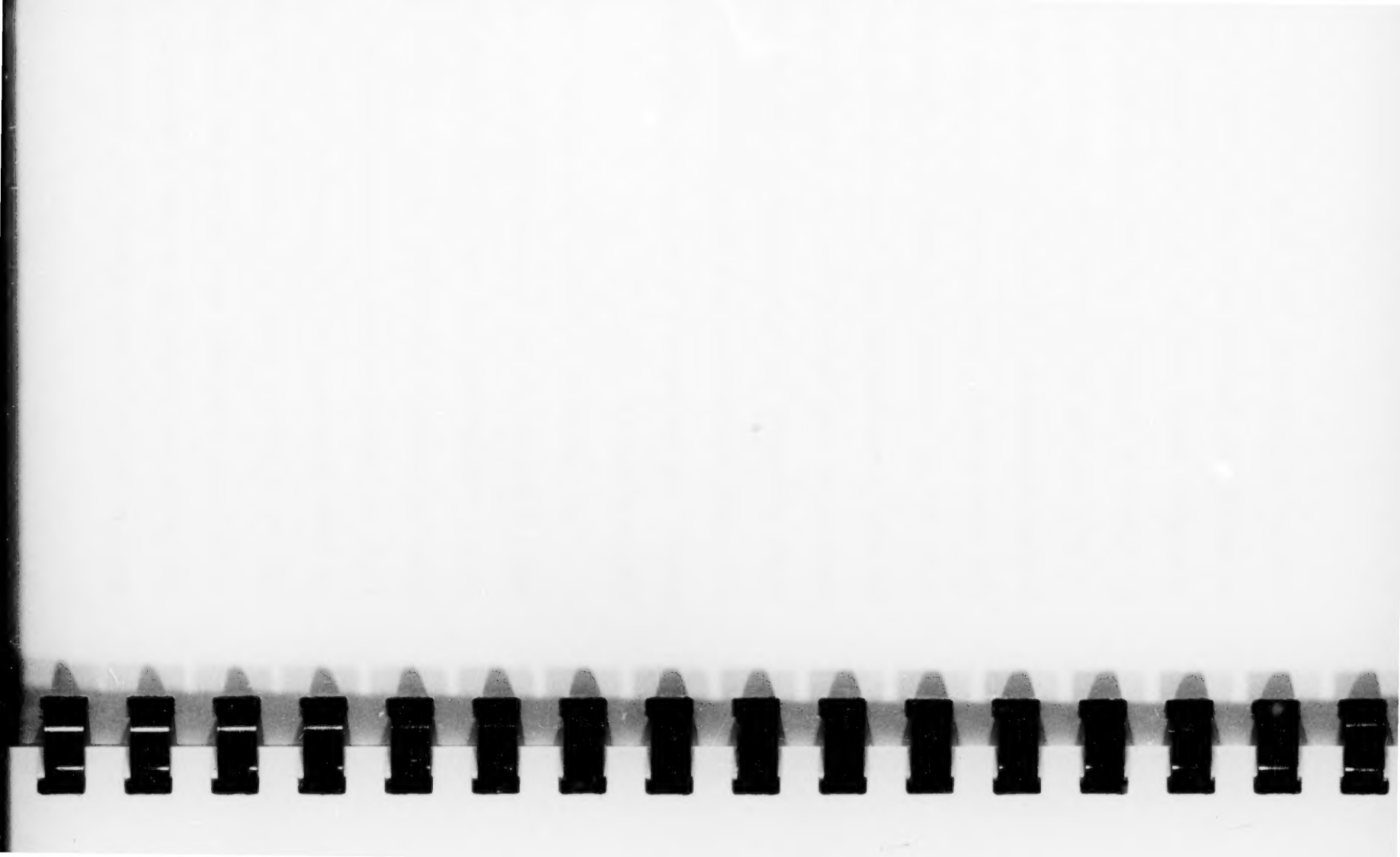
This appeal raises a procedural due process question of substantial importance. In general terms, what due process safeguards apply to a personal representative or fiduciary in initiating or settling claims on behalf of persons whose interests he or she represents? In the context of this case, three interreiated questions are presented:

1. Whether the Georgia Wrongful Death Act, OCGA §51-4-2, on its face violates the procedural due process standards of the Fourteenth Amendment because of a surviving spouse binding authority to forego suit or settle claims without: (a) notice to the decedent's children



and an opportunity for them to object to any proposal to forego suit or to settle the wrongful death claim; (b) the concurrence of at least a majority of the decedent's children to any course of action the surviving spouse might recommend; (c) judicial approval of any decision by the surviving spouse to forego suit or to settle any wrongful death claim; or (d) a mechanism for removing the surviving spouse as representative of the children when evidence is adduced that she is hostile to their interests and is either unable or unwilling to pursue a wrongful death action on their behalf?

2. Whether the Georgia Wrongful Death Act, OCGA §51-4-2, as aplied in this case violates the procedural due process standards of the Fourteenth Amendment when, despite substantial evidence of the surviving spouse's hostility to the interests of decedent's children and her failure to take any steps to protect those interests, the Act was construed to deny the children any right to bring a wrongful death action in their own behalf or, alternatively,



to secure the removal of the surviving spouse as their representative?

3. In light of Logan v. Zimmerman Brush Co., 455 US 422 (1982), whether the Georgia Supreme Court's recognition of a cause of action by the children against the surviving spouse saves the Georgia Wrongful Death Act, OCGA §51-4-2, from a declaration of unconstitutionality where there is no bond requirement to insure the children would be made whole if the surviving spouse, through dereliction of duty or misfeasance, fails to represent their interests adequately?

PARTIES

In addition to the parties listed in the caption, Lee Mitchell, Beth Burgess, Stan Long, Snell, Inc., and Gwinnett County, Georgia were named as third party defendants in the trial court. In view of the trial court's disposition of the main action by grant of summary judgment, the third party defendants were not parties before the Supreme

Court of the State of Georgia.

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HOSPITAL AUTHORITY OF GWINNETT COUNTY, et al.,

Appellees.

On Appeal From The Supreme Court Of The State of Georgia

JURISDICTIONAL STATEMENT

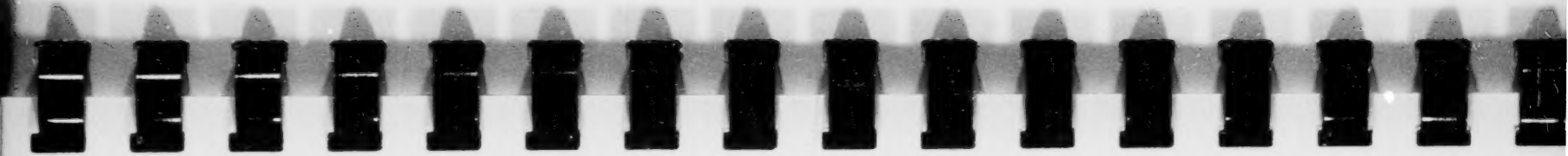
This appeal is from the final judgment of the Supreme Court of Georgia, dated October 29, 1986, upholding the Georgia Wrongful Death Act, OCGA §51-4-2, against Appellants' challenge that it lacks procedural due process safeguards required by the Fourteenth Amendment of the United States Constitution.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Georgia is reported at 256 Ga. 373, 349 SE2d 382 (1986). (A-3) The opinion of the State Court of Fulton County, Georgia is not reported. (A-1)

JURISDICTION

The final judgment of the Supreme Court of Georgia, rejecting Appellants' claim that OCGA §51-4-2 was unconstitutional, was entered October 29, 1986. (A-3) Notice of Appeal to this Court was duly filed in the Supreme Court of Georgia on January 22, 1987. (A-13) This case is subject to the notification requirement of 28 U.S.C. §2403(b). This appeal is docketed within 90 days from the entry of judgment below. Jurisdiction of this Court rests on 28 U.S.C. §1257(2).



CONSTITUTIONAL AND STATUTORY PROVISIONS

.S. Constitution, Amend. XIV, §1:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

eorgia Wrongful Death Act, OCGA §51-4-2:

1-4-2. Persons entitled to bring action for wrongful death of spouse or parent; survival of action; release of wrongdoer; disposition of recovery; exemption of recovery from liability for decedent's debts; recovery not barred by child's illegitimacy.

(a) The surviving spouse or, if there is o surviving spouse, a child or children, either inor or sui juris, may recover for the homicide f the spouse or parent the full value of the ife of the decedent, as shown by the evidence.

(b)(1) If an action for wrongful death s brought by a surviving spouse under subection (a) of this Code section and the survivng spouse dies pending the action, the action hall survive to the child or children of the lecedent.

(2) If an action for wrongful death is brought by a child or children under subsection (a) of this Code section and one of the children dies pending the action, the action shall survive to the surviving child or children.

(c) The surviving spouse may release the alleged wrongdoer without the concurrence of the child or children or any representative thereof and without any order of court, provided that such spouse shall hold the consideration for such release subject to subsection (d) of this Code section.

(d) The surviving spouse shall hold any amount recovered under subsection (a) of this Code section subject to the law of descents, as if it were personal property descending from the decedent to the surviving spouse and to the children, provided that such recovery shall be equally divided, share and share alike, between the surviving spouse and the children per capita, and the descendants of children shall take per stirpes. Notwithstanding the preceding sentence, the surviving spouse shall receive no less than one-fourth of such recovery as

such spouse's share.

(e) No recovery had under subsection (a) of this Code section shall be subject to any debt or liability of the decedent.

(f) In actions for recovery under this Code section, the illegitimacy of a child shall be no bar to recovery.

STATEMENT OF THE CASE

1. Facts

On May 20, 1985, William Harold O'Kelley's car collided with a car driven by Esther Reifman. O'Kelley suffered major injuries, including severe burns over a large part of his body. He was taken to Joan Glancy Hospital in Duluth, Georgia. There physicians determined that O'Kelley had to be transferred to a hospital in Augusta, Georgia which specialized in the treatment of burn victims. A helicopter ambulance was summoned to move O'Kelley. As the helicopter took off from a parking lot outside Joan Glancy Hospital, it hit a light pole and crashed. O'Kelley suffered additional injuries and could not be moved to the burn clinic in Augusta for the special care that he needed. He died six days later in Atlanta, Georgia at Grady Hospital.

William Harold O'Kelley was survived by Daisy O'Kelley, who was his third wife. There were no children from that marriage. Mr. O'Kelley had four children by two prior marriages, all of whom survived him. These children were William Daniel O'Kelley, Donna O'Kelley Kilgore,

Carol Ann O'Kelley and Christopher Todd O'Kelley. Carol Ann and Christopher Todd were minors at the time of Mr. O'Kelley's death and are still minors. None of Mr. O'Kelley's children has ever lived with or been in the custody of Daisy O'Kelley.

Daisy O'Kelley's dislike or animosity toward Mr. O'Kelley's children has never been disputed in this case. Nor is there any dispute that Daisy O'Kelley has not yet filed a wrongful death action in connection with the death of her former husband. If she has attempted to resolve this claim by settlement, she has not communicated that fact to Appellants or to their counsel. The statute of limitation will bar a wrongful death claim arising from Mr. O'Kelley's death as of May 27, 1987.

2. Proceedings Below

Under these circumstances, Mr. O'Kelley's four children decided to act on their own. They filed a wrongful death action in the State

Court of Fulton County, Georgia.[1] The defendants

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[1] In Georgia, the wrongful action is separate from what is known as the pain and suffering action. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208 (1958). The latter action may be brought only by the administrator of the decedent's estate and thus is subject to oversight by the probate court and other procedural safeguards such as a bond requirement for the administrator. See OCGA §§53-7-30 (bond requirement); 53-7-105 and 106 (settlements require court approval); 53-7-148 (administrator subject to removal); 53-7-48 and -167 (administrator liable for misfeasance in office). In serious cases involving neglect or misconduct, the administrator can be removed as was done in connection with William Harold O'kelley's estate. The probate court of Gwinnett County, Georgia removed Daisy O'Kelley as sole administrator because of (1) a late and false inventory of the assets of the decedent's estate; and (2) distrust between Daisy and O'Kelley and the decedent's children. (A-) In addition to her failure to file a wrongful death action, Daisy O'Kelley has not filed a pain and suffering action either.

None of these procedures are available against Daisy O'Kelley in her capacity as representative of the decedent's children in connection with the wrongful death claim. OCGA §51-4-2(c).

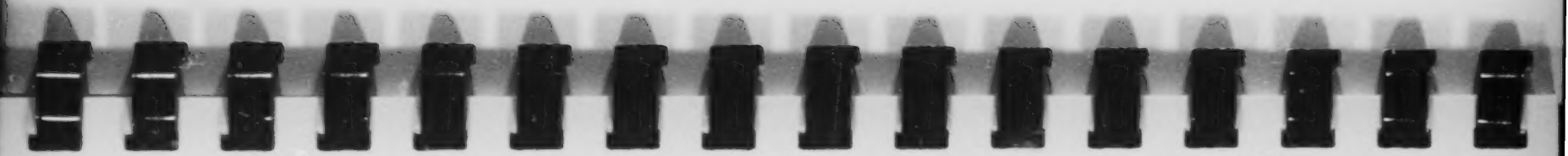
named in that action are now before this Court as Appellees. The defendants responded by moving for summary judgment in reliance on OCGA §51-4-2(a) which vests the right to bring a wrongful death action exclusively in the surviving spouse. Under Georgia law, a decedent's children cannot even be parties to such an action. The surviving spouse is their representative. The children must depend on the surviving spouse's initiative and good will to protect their statutory right to share in a recovery for the full value of the deceased parent's life. The trial court rejected the O'Kelley children's argument that OCGA §51-4-2 violated both state and federal procedural due process principles. Accordingly, it granted the defendant's motion for summary judgment.

The Supreme Court of Georgia affirmed in a brief opinion handed down on October 29, 1986. The Court noted Appellants' contention that as children of the decedent, they possessed a property right in the wrongful death action. It appears that the Court agreed with this proposition inasmuch as it was based on a series

of Georgia appellate decisions explicitly recognizing it. See Davis v. Cox, 131 Ga. App. 611, 206 S.E.2d 655 (1974); Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972); Travelers Ins. Co. v. Houck, 118 Ga. App. 154, 162 S.E.2d 781 (1968). The leading such case is Walden v. Coleman, 217 Ga. 599, 124 S.E.2d 265 (1962) in which the Georgia Supreme Court declared:

> [W]e hold that each of the beneficiaries specified by Code Sec. 105-1302 (statutory predecessor to OCGA §51-4-2) has a separate cause of action for the death of their husband and father, which the mother, if in life asserts by action for all of them. Id., 217 Ga. at 605, 124 S.E.2d at 268.

The Court below next addressed the argument that OCGA §51-4-2 was fatally deficient on due process grounds. The Court rejected Appellants' argument and cited Mack v. Moore, 256 Ga. 138, 345 S.E.2d 338 (1986), one of its recent decisions as controlling authority. Mack v. Moore involved an equal protection challenge to OCGA §51-4-2. The Appellant in



that case did not make a procedural due process argument or cite any of the many procedural due process decisions of this Court. Nevertheless, the Georgia Supreme Court in Mack v. Moore appeared at least implicitly to recognize that OCGA §51-4-2 was constitutionally flawed. It observed that the surviving spouse in bringing a wrongful death action acted both as an individual and as a representative of any surviving children. Accordingly, it held that the surviving spouse owes a duty to the children prudently to assert, prosecute or settle a wrongful death claim. If the surviving spouse fails in that regard, the children have the remedy of bringing a lawsuit against the surviving spouse for breach of duty. Relating the Mack v. Moore analysis to the present case, the Court found this cause of action to be a sufficiently adequate remedy to withstand challenge on procedural due process grounds. The Court below did not cite or discuss Logan v. Zimmerman Brush Co., 455 US 422 (1982).

THE QUESTIONS ARE SUBSTANTIAL

1. Introduction

As the surviving spouse under OCGA §51-4-2, Daisy O'Kelley is authorized to represent not only her own interests but those of the decedent's four children as well. This appeal poses two questions of broad significance. First, does the Due Process Cause of the Fourteenth Amendment govern the actions of legal representatives such as Daisy O'Kelley? Second, if the Due Process Clause does apply, what minimal procedural safeguards are required and at what point are they required? This Court has never addressed these issues in connection with a wrongful death statute. In fact, even in the state courts where such issues would be most likely to arise, there have been few constitutional challenged of any type over the years to wrongful death legislation, see S. Speiser, RECOVERY FOR WRONGFUL DEATH 2D §1:11 (1975) and only a handful of those constitutional challenges have had a procedural due process dimension. Compare Wood v. Dunlop,

83 Wash.2d 719, 521 P.2d 1177 (1974) with In re Estate of White, 289 Or. 13, 609 P.2d 365 (1980). Yet, it appears that in many jurisdictions, as in Georgia, a decedent's personal representative can act without judicial oversight or other procedural safeguards, such as a bond requirement, in dealing with a wrongful death claim. S. Speiser, RECOVERY FOR WRONGFUL DEATH 2D §5:15 (1975). The element of risk inherent in this laissez faire approach increases substantially when there has been divorce in the family and there are children from different marriages. The premise that the surviving spouse has natural affection for all of the former partner's children simply does not square with experience. Giving the surviving spouse unfettered discretion to pursue or to forego a wrongful death claim -- as Georgia does here to Daisy O'Kelley -- can have severe financial and emotional consequences. As the law stands, a decedent's children in Georgia have no meaningful recourse except the right to bring a lawsuit against the surviving spouse for breach

of duty. This remedy is too little, too late. Appellants ask this Court to discuss and clarify constitutional standards in this important area of family law.

2. This Court's Decisions Apply Due Process Standards To Third Parties Possessing The Legal Authority To Abrogate The Property Rights Or Liberty Interests Of Others.

Despite the fact that this Court has never dealt squarely with the issues raised by this appeal, it has on various occasions discussed the limits of third party authority over the legal rights and interests of others. In every instance, it has found due process principles to be applicable.

An early example is State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 US 116 (1928). In 1923 the City of Seattle passed a zoning ordinance which permitted a wide range of uses. Included among them was a philanthropic home for the elderly which had been situated in the city since 1914. In 1925, the zoning ordinance was amended and one of the changes dealt specifically with

philanthropic homes for children or the elderly. Thereafter, for such homes to operate lawfully, the consent of two thirds of the property owners within 400 feet was required. Apparently this amendment was not intended to apply to pre-existing uses such as 1914 philanthropic home. Nevertheless, the amendment was applied when the owner of the philanthropic home requested a permit to allow him to raze the old building and construct a new one in its place. The city building superintendent refused the permit because the necessary consents had not been obtained.

This Court reversed the decision of the Washington Supreme Court sustaining the constitutionality of the zoning ordinance. It ordered the issuance of the building permit with these telling comments:

> The [zoning ordinance] purports to give the owners of less than one-half the land within 400 feet of the proposed building authority -- uncontrolled by any standard or rule prescribed by legislative action -- to prevent the trustee from using the land for

> the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice . . . The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. Id. at 121-22. (citations omitted; emphasis supplied).

In Hansberry v. Lee, 311 US 32 (1940), this Court dealt with due process standards governing the adequacy of representation in a class action context. The case involved the enforceability of a racially restrictive land covenant. The crucial provision in the covenent was a requirement that owners of 95% of the frontage in the residential area concur in the racial restrictions. Lee alleged that the racial restrictions were enforceable and sought to bar Hansberry, who was black, from moving in. Lee opposed Hansberry's attempt to litigate whether the necessary 95% concurrence

actually had been obtained. According to Lee, this issue had been raised in Burke v. Kleiman, a class action lawsuit involving the validity of the same covenant. There the necessary 95% concurrence had been the subject of stipulation by the parties. Lee contended that the interests of the class plaintiffs in Burke v. Kleiman were in precise alignment with Hansberry's interests and therefore Hansberry was bound by that stipulation under applicable Illinois res judicata principles. The Illinois Supreme Court agreed. Id. at 37-39.

This Court in Hansberry recognized the established rule originating in equity that class action litigation is ordinarily binding on class members who are not parties to the proceeding. After discussing the compelling policy reasons for this rule, the Court acknowledged that the rule was limited by due process principles "In those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are bound by it." Id.

at 42. The Court, however, rejected the basic premise that plaintiffs in the Burke v. Kleiman litigation adequately represented Hansberry's interests and reversed the judgment of the Illinois Supreme Court. After all, the Court noted, the plaintiffs in the Burke action sought to enforce not to oppose the racially restrictive covenant. The fact that plaintiffs in Burke were signers of the restrictive covenant did not mean that they could speak for all other signers or their successors in interest -- many of whom might be opposed to the enforcement of the covenant. Id. at 44. As far as the defendants in Burke were concerned, they were not designated as a class and in fact, suspected the Court, they may not have been opposd to the enforcement of the covenant. Id. at 46-47. In short, no party in the Burke action spoke for Hansberry or anyone else genuinely opposed to the racially restrictive covenant.

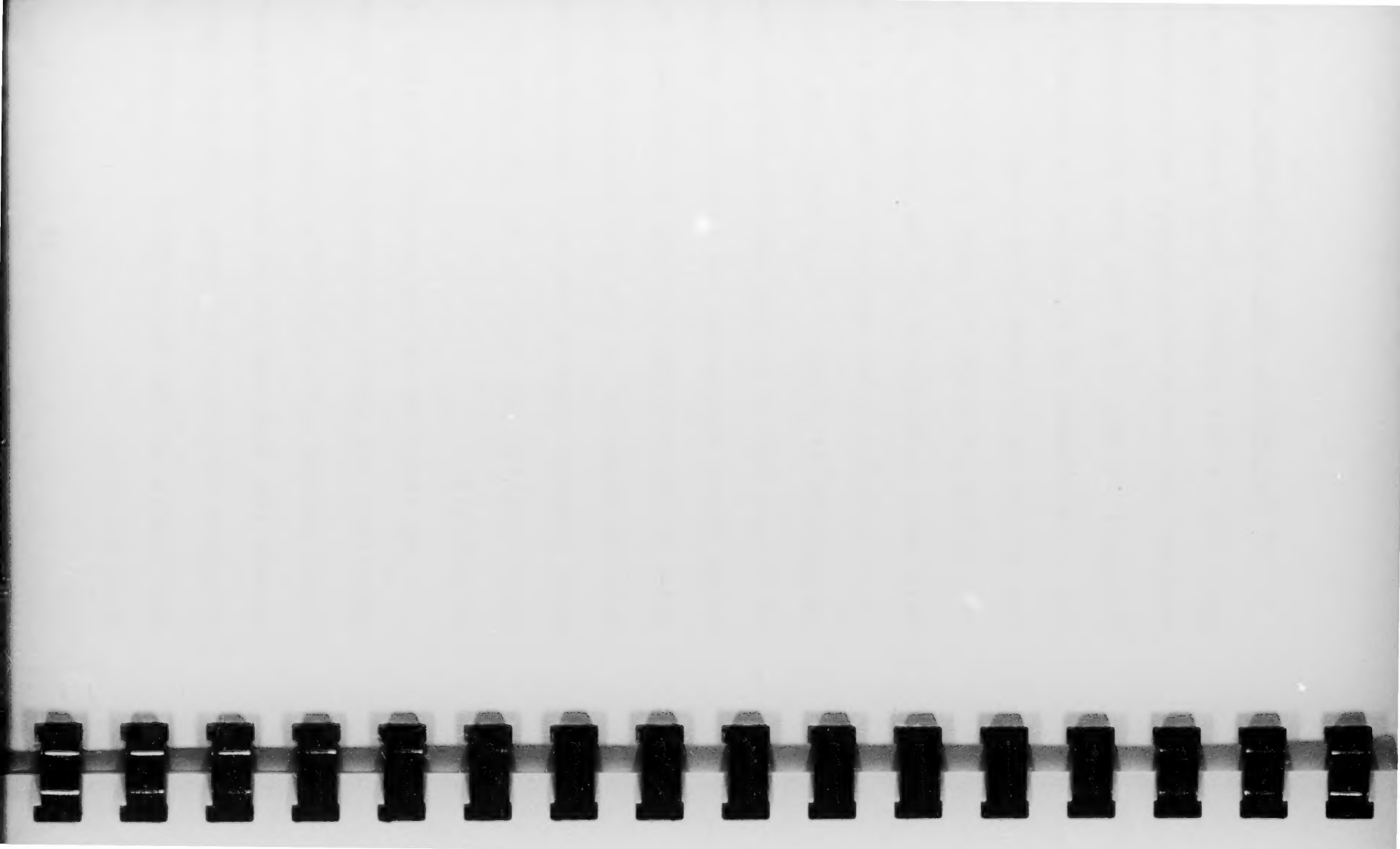
The Supreme Court's concern about adequacy of representation in Hansberry v. Lee strongly parallels Appellants' concerns in this case.

Daisy O'Kelley is nothing more than the statutorily designated class representative of the decedent's children for the purpose of bringing the wrongful death action. What this Court said concerning the adequacy with which Hansberry's interests were represented in Burke applies equally to Daisy O'Kelley:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substatnial interests are not necessarily or even probably the same as those who they are deemed to represent, does not afford that protection to absent parties which due process requires. Id. at 46. (citations omitted; emphasis supplied).

In Mullane v. Central Hanover Bank & Trust Co., 339 US 306 (1950), this Court again addressed the issue of adequacy of representation. Pursuant to New York law, the bank petitioned for a settlement of accounts in connection with its duties as trustee of a common trust fund. The effect of granting such a petition would have been termination of the right of action by trust beneficiaries against the bank for mismanagement of funds. To protect the interests of income and principal beneficiaries, the trial court appointed two attorneys to participate in the proceeding, one of whom was Mullane. Mullane objected to the proceeding on due process grounds because the only notice given to beneficiaries was notice by publication. Id. at 307-313.

At least as to the property rights of beneficiaries whose whereabouts were known, this Court agreed with Mullane's argument. It viewed the deprivation of the beneficiary's property interests in terms that are readily applicable to the Appellants' interests under OCGA §51-4-2:



> In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairment of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process. Id. at 313.

It is important not to misunderstand the analogy that Mullane provides in the present case. In Mullane, as in the present case, the property right subject to loss is one against the primary tortfeasor: the bank administering the common fund trust, on the one hand, and the parties who actually inflicted the injuries on William Harold O'Kelley on the other. It is totally irrelevant to the reasoning in Mullane and should be irrelevant here, that a substitute tortfeasor might be available. No doubt the trust beneficiaries

in Mullane could have sued Mullane and his fellow attorney for legal malpractice based on proof of inadequate representation in the accounting action. But there is not the slightest hint in Mullane that this alternative would somehow justify New York in denying trust beneficiaries the right to notice and an opportunity to speak in court for themselves. Under OCGA §51-4-2 Georgia attempts to impose the very second hand legal status on the O'Kelley children that New York was forbidden from doing in Mullane.

Finally, this Court in Parham v. J.R., 442 US 584 (1979), considered whether the requirements of procedural due process applied to Georgia's involuntary commitment law for children. The Court found that even when natural parents or a legal guardian seek to have a child committed for the purpose of receiving mental health treatment, some procedural safeguards must be observed. In reaching this conclusion, the Court gave great weight to the parental role in guiding and caring for children. It also reaffirmed the traditional presumption that parents -- given the "natural bonds of

affection" -- act in their children's best interest. Yet, in the final analysis, none of these considerations were so compelling to the Court that parents could be deemed to possess "absolute and unreviewable discretion to decide whether to have a child institutionalized." Id. at 605. Procedural due process required the participation of a "neutral factfinder" in this decisionmaking process.

In short, Parham v. J.R. establishes that government cannot delegate to parents unfettered discretion to deal with the rights and interests of minor children. If this premise is valid in connection with a minor's institutionalization in a mental health facility, then surely it is relevant to the plight of the O'Kelley children. They have suffered the loss of their father and have a protected property interest under Georgia law to recover for the full value of his life. Yet, their fate in this matter, according to OCGA §51-4-2, is placed in the hands of Daisy O'Kelley. She is a virtual stranger to them; she feels no "natural affection" for them; and apparently

she has no interest in pursuing her own legal rights if doing so means that they too, must benefit. Quite unlike the commitment statute upheld in Parham v. J.R., however, the Georgia Wrongful Death Act provides no safeguards whatever to protect a decedent's children from the spite, incompetence or neglect of a surviving spouse. There are various procedural alternatives, each of which is recognized elsewhere under Georgia law, that could be utilized to protect Appellants.[2] The Georgia Supreme Court, however, has refused to take this possibility seriously and now only this Court has the power to direct consideration of procedural alternatives that will satisfy the minimum requirements of due process.

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[2]These procedural alternatives are outlines in part 4 of this section where Appellants show why the remedy of a cause of action against Daisy O'Kelley is inadequate under the rationale of Logan v. Zimmerman Brush Co., 455 US 422 (1982).

3. The Georgia Wrongful Death Statute, OCGA §51-4-2, Is Unconstitutional On Its Face And As Applied.

In the preceding section, Appellants placed the constitutional questions in this case in a broader context and suggested that they have an importance which transcends the immediate interests of the parties. Appellants will now demonstrate why OCGA §51-4-2 falls well short of the procedural due process standards established by the decisions of this Court.

The minimum requirements of procedural due process under the United States Constitution are notice and the opportunity to be heard at some point prior to final adjudication. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532-542, 105 S. Ct. 1487, 1493-94 (1985); Gore v. Davis, 243 Ga. 534, 256 S.E.2d 329 (1979). Subsection (c) of OCGA §51-4-2 violates these basic principles. It confers unfettered discretion on the surviving spouse to release the alleged wrongdoer. Neither the concurrence of the decedent's children nor the approval of a court is necessary in order for a

release to become legally binding. In effect, OCGA §51-4-2 delegates to a private party[3] -- the surviving spouse -- the power to settle a wrongful death action for any amount no matter how small or even to forego the action altogether.

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[3]State delegation of adjudicative power to a private individual is not ipso facto a violation of procedural process. But, as Judge Posner of the Seventh Circuit has noted, "[a] state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law." Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc., 795 F.2d 1344, 1346 (7th Cir. 1986). One factor crucial to the constitutionality of any private action impairing a protected property interest is subsequent judicial accountability. United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 140-142 (3rd Cir. 1986); Robbins v. Pepsi-Cola Metropolitan Bottling Co., 636 F. Supp. 641, 672-676 (ND Ill. 1986). Under OCGA §51-4-2, the surviving spouse's decision to forego a wrongful death action or to settle it on unfavorable terms is not judicially reviewable in itself. In other words, regardless of the surviving spouse's personal liability for neglect or misfeasance, the decision to release or compromise a claim would release the alleged tortfeasors in this case from any further risk of liability and do so irreversibly.

Perhaps the most compelling case supporting Appellants' position is Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The complainant in Logan filed a charge of handicap discrimination with the Illinois Fair Employment Practices Commission. Under the governing Illinois statute, the Commission had to convene a fact-finding conference within 120 days after the filing of charges. For reasons entirely beyond the complainant's control, the Commission failed to convene a factfinding conference in Logan's case within the required 120 day period. This resulted in a motion by the company to dismiss Logan's discrimination charge. Although the motion was rejected by the Commission, the Illinois Supreme Court reversed. Id. at 424-428.

The Illinois Supreme Court's decision rested on two grounds. First, the requirement of a factfinding within the 120 day period was considered jurisdictional. A failure to comply -- even if the fault of the Commission and not the complainant -- meant that the Commission no longer had the authority to

consider a complainant's charges. Logan, thus, lost the only Illinois forum that he had to press his discrimination claim. Id. at 427. Second, and more fundamentally, this mandatory rule of default did not, in the Illinois Supreme Court's view, violate Logan's due process or equal protection rights. It reasoned that the state legislature in formulating a substantive right could also establish the procedural safeguards associated with its exercise -- apparently free of the fetters of judicial review. Id. at 428.

This Court rejected the Illinois Supreme Court's analysis. At the outset, the Court had to identify a state created property interest, which it was readily able to do. Logan's discrimination claim was one that could be set aside under Illinois law only if the evidence to support the factual allegations was insufficient. Id. at 430-432. On this issue, the Illinois Supreme Court had reasoned that Logan did not have a cause of action for handicap discrimination until after the Commission had

taken appropriate action within the 120 day period.[4]

The Court's response to this line of argument in Logan is highly relevant to the present case. Rather bluntly, the Court stated that the Illinois Supreme Court misunderstood the nature of the due process guarantee. While the state has the power to define substantive property interests in the first instance, it does not have the authority to judge the adequacy of the procedural safeguards necessary to their protection. The determination of procedural adequacy is exclusively one for the courts. Id. at 432-433. Accordingly, the Court in Logan found that "[t]he 120-day limitation in the FEPA . . . is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim." Id. at 433.

At this point, the Court considered the adequacy of FEPA's procedural safeguards. The

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[4]The Appellees below had similarly argued that no protected property rights would come into being under OCGA §51-4-2 until -- and not an instant before -- the surviving spouse had obtained a recovery for the full value of the decedent's life.

dismissal of Logan's charge because of the expiration of the 120 day period resulted in a final deprivation of his statutory right to seek redress for discrimination.[5] This deprivation occurred in a random manner, through no fault of Logan's, and with no chance ever for judicial review. Id. at 434-435. The Court dismissed the state's interest in having the random default rule as "insubstantial." Then, it added that Logan was not only entitled to a hearing on the merits of his discrimination claim, but this hearing had to precede a final determination of his rights under FEPA. Id.

The Court's analysis in Logan provides powerful support for Appellants' position in

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[5]The dismissal was final in that it eliminated all possibility of a remedy on Logan's behalf against the alleged wrongdoer: Zimmerman Brush Company. The dismissal apparently did not foreclose a tort remedy against the FEPA official whose neglect or misfeasance resulted in the expiration of the 120 day period. But whether the second remedial option was the equivalent of the first is what the Supreme Court's "adequacy" determination was all about in Logan.

the present case. OCGA §51-4-2 authorizes Daisy O'Kelley, the surviving spouse in the present case, to compromise or even to forego a wrongful death recovery for good reason, bad reason or no reason at all. Worse still, as was the case in Logan, OCGA §51-4-2 specifically denies Appellants a judicial forum to seek review of what is in effect a "private" and legally conclusive adjudication (or extinguishment) of their property rights against the alleged tortfeasors.[6] Appellants' remedy of last resort is suit against Daisy O'Kelley. The adequacy of that remedy will be discussed in Part 4 of this section of the jurisdictional statement.

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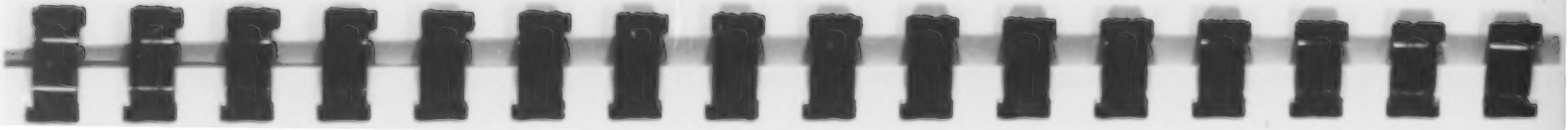
[6]Footnote 5 of the Logan opinion indicates that Boddie v. Connecticut, 401 U.S. 371 (1971) provided an alternative means of analysis to support the conclusion that the Illinois mandatory default rule was a denial of procedural due process. According to the Court, the mandatory default rule, when it came into play, denied Logan access to court for consideration of his discrimination claim. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Wholly apart from its total lack of safeguards, OCGA §51-4-2 violates due process principles for another reason. Even if every available procedural right known to the law were applicable to wrongful death actions in Georgia, there would still be a concern because of Daisy O'Kelley's hostility toward the interests of the O'Kelley children. Her disqualification as administrator of the decedent's estate amply demonstrates that this concern is genuine. (A-17) Independent of the need for formal procedural safeguards such as notice and an opportunity for a hearing, due process also demands that the person who adjudicates or controls the property rights of another must be neutral. The rationale for this requirement was well stated by this Court in Parham v. J.R., 442 US 584, 606 (1979). See also Connally v. Georgia, 429 US 245 (1977); Gibson v. Berryhill, 411 US 564 (1973). At the least, these considerations militate strongly in favor of vacating the judgment of the Georgia Supreme Court in this case with instructions to conduct a hearing to determine the extent



of Daisy O'Kelley's bias and the effect it may have had on her willingness to protect the property rights of the O'Kelley children. If this hearing results in the disqualification of Daisy O'kelley, then Appellants ought to be afforded the right to vindicate their interests by a direct action against Appellees under OCGA §51-4-2.

4. The Right Of Action Against Daisy O'Kelley For Breach Of Duty Is Inadequate Under This Court's Decision In Logan v. Zimmerman Brush Co., 455 US 422 (1982).

In Logan, the company contended that Logan's due process rights would be adequately protected through a tort action against the Commission official whose neglgect caused the forfeiture of his discrimination claim. Recognizing the availability of such an action, this Court rejected it as a grossly inadequate substitute for procedurally fair treatment in the first instance before the Illinois Fair Employment Practices Commission. Id. at 436-437. If Logan was the victim of the random neglect of a state official, what possible justification was there for allowing that

event to foreclose his claim against the alleged first wrongdoer -- Zimmerman Brush Company -- and to force him to seek his remedy against a second? As the Court observed, a post-deprivation remedy can only be justified if there is no other feasible means of accommodating the interests of the state and the individuals affected.

With all respect, it is clar that the Georgia Supreme Court's reliance on an independent cause of action against the surviving spouse has all the flaws noted by this Court in Logan. First, under this approach, the right to proceed against the primary tortfeasor is lost forever. There is clearly an irreversible deprivation of a property right at least to that extent. The question is whether a right of action for breach of duty against the surviving spouse is an adequate substitute for participation by the children in their own right and with their own attorneys in the wrongful death action against the primary tortfeasor. It is hard to see how a collateral attack against the surviving spouse can be comparable

to joint participation in the main lawsuit with the fairness and finality that it would yield. Under the Georgia Supreme Court's approach, the O'Kelley children will have to make the fiduciary law equivalent of an ineffective assistance of counsel argument against Daisy O'Kelley.

Second, it is highly conjectural whether even a successful action against the surviving spouse can make the children whole. The present case offers an excellent illustration of why. The potential damages are substantial. Thus, insurance coverage makes an action against the named defendants critical to actual recovery for the full value of decedent's life. Daisy O'Kelley is a woman of very modest means. She cannot cover her potential liability as a fiduciary; nor apparently can she post an adequate bond.

A final consideration is whether procedural alternatives are readily available to govern wrongful death actions in Georgia. Appellants suggest that there are. Georgia law recognizes three types of fiduciaries or legal representatives who function in virtually the same manner

that a surviving spouse is expected to function concerning the prosecution of a wrongful death action. They are guardians, executors and administrators, and trustees. They are subject to the following restrictions designed to protect the legal rights and interests of dependents and beneficiaries:

(1) bond requirement, OCGA §§ 29-2-40; 29-4-13 and -14 (guardians); OCGA §53-7-30 (executors and administrators); OCGA §§53-13-3, -15, -16, and -17 (trustees);

(2) judicial oversight of settlement of claims and disposition of property, OCGA §§29-2-3, -4, -16, -17, and -18 (guardians); OCGA §§53-7-106 and -107 (executors and administrators); OCGA §53-13-82; (trustees);

(3) removal for cause, OCGA §29-2-45 (guardians); OCGA §53-7-148 (executors and administrators); OCGA §§53-13-3, -5, and -8 (trustees);

(4) periodic accounting, OCGA §§29-2-24 and -78 (guardians); OCGA §53-7-75 (executors and administrators); OCGA §53-13-84 (trustees);

(5) civil liability for misfeasance in conduct of duties, OCGA §§29-2-50 and -51 (guardians); OCGA §§53-7-48 and -167 (executors and ad-

ministrators); OCGA §53-13-61, -84 and -85 (trustees).

The established usage of these procedures suggests forcefully that Georgia can accommodate Appellants' real need for stronger safeguards for their property rights. The balancing requirements of Matthews v. Eldridge, 424 US 319 (1976) are readily met.

CONCLUSION

Appellants urge this Court to note probable jurisdiction in this case and set the matter for full briefing and oral argument. In the alternative, they ask that the judgment of the Georgia Supreme Court below be vacated with instructions to reconsider in light of Logan v. Zimmerman Brush Co., 455 US 422 (1982).

Respectfully submitted,

Albert M. Pearson, III
Counsel of Record
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

APPENDIX

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

WILLIAM DANIEL O'KELLEY, DONNA GAYLE KILGORE, and PATRICIA WILLIAMS, as mother and next friend of CAROL ANN O'KELLEY and CHRISTOPHER TODD O'KELLEY, minors,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO. 103118
HOSPITAL AUTHORITY OF GWINNETT COUNTY, d/b/a GWINNETT AMBULANCE SERVICE, INC., CARLSON SOUTHEAST CORP. and ESTHER REIFMAN,	)	
Defendants,	)	
and	)	
ESTHER REIFMAN,	)	
Third-Party Plaintiff	)	
vs.	)	
GWINNETT COUNTY, E.R. SNELL, INC., LEE MITCHELL, BETH BURGESS, and STAN LONG,	)	
Third-Party Defendants	)	

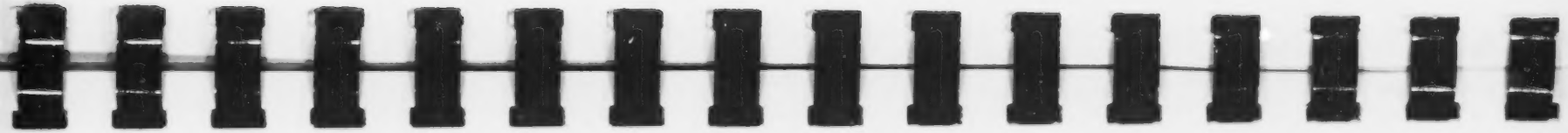
ORDER

Defendants' Motion for Summary Judgment having come before this Court for oral argument, the Court heard oral arguments from counsel for Plaintiffs and Defendants on July 10, 1986. After consideration of the arguments of counsel and the Briefs filed by the parties and the authorities cited therein, the Court is not inclined to declare O.C.G.A. §51-4-2 unconstitutional. It is therefore,

ORDERED that Defendants' Motion for Summary Judgment is granted and that this action is dismissed in its entirety.

SO ORDERED this 15th day of July, 1986.

/s/
JERRY W. BAXTER, JUDGE
STATE OF COURT OF FULTON COUNTY



In the Supreme Court of Georgia

Decided: Oct. 29, 1986

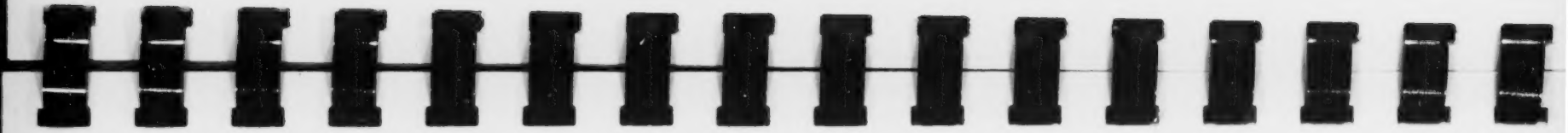
43854. O'KELLEY et al v. HOSPITAL AUTHORITY OF GWINNETT COUNTY et al.

SMITH, Justice.

The fulton County Superior Court granted the appellees' motion for summary judgment. The appellants, children of William O'Kelley, assert that the trial court's grant of the appellees' motion denied them due process. We affirm.

William O'Kelley was severely burned in a car wreck in Gwinnett County. He was further injured when the helicopter ambulance intended to take him to a burn clinic in Augusta, Georgia crashed. He died six days later in Grady Hospital.

O'Kelley's third wife, Daisy O'Kelley, has not pursued a wrongful death action for O'kelley's death. His children from his first and second marriages sued the appellees, various parties connected with the events surrounding O'Kelley's death, under OCGA §51-4-2, for O'Kelley's wrongful death. The Fulton County



Superior Court granted the appellees' motion for summary judgment on the grounds that the cause of action for O'Kelley's wrongful death vested, under OCGA §51-4-2, in Daisy O'Kelley rather than in O'Kelley's children.

The appellants contend that they possess a property right in the action for their father's wrongful death. They further assert that OCGA §51-4-2, in granting Daisy O'Kelley the exclusive right to initiate that action, denies them an effective procedure through which they might vindicate their right. We find that Mack v. Moore, 256 Ga. 138 (345 SE2d 338) (1986) controls this case adversely to the appellants.

In Mack, supra, we acknowledged that one spouse in a wrongful death action for the death of the other spouse acts both as an individual and as a representative of any children of the deceased spouse. We then held that the surviving spouse owes a duty to the children to prudently assert, prosecute, or settle the wrongful death claim. Finally, we stated that, "[t]he failure to do this could subject

the spouse to liability for breach of duty as a representative." Mack, supra, at 139.

This holding adequately protects any property interest that children might have in an action for a parent's wrongful death. The legislature has created a procedure intended to enable children to share in any proceeds of such an action. It has not created a procedure whereby they might share in control of such an action. We find the legislature's handling of this delicate and emotional area of the law constitutionally adequate.

Judgment affirmed. All the Justices concur except Gregory, J., who concurs in judgment only; and Weltner and Bell, JJ., who concur specially.

43854. O'KELLEY et al v. HOSPITAL AUTHORITY OF GWINNETT COUNTY et al.

WELTNER, Justice, concurring specially.

It is certainly true, as the majority opinion observes, that OCGA §51-4-2 vests the cause of action (as opposed to the right to participate in its proceeds) in a surviving spouse. That, however, cannot serve to oust a superior court of its general equitable powers to supervise litigation pending before it in such a manner as shall fairly protect the substantive and procedural rights of any party at interest.

It is not difficult to suppose a situation where a surviving spouse might simply refuse to initiate litigation, which would result in the bar of the statute of limitations to any participation by surviving children. Nor is it any exercise in the imagination to suggest that bad blood between step-children and step-parent might continue beyond death, so that the desires of one might be in irresolvable opposition to the interests of another.

The residuum of supervisory powers of a court of equity alone, I suggest, can provide for the protection of all parties' rights in a difficult situation -- as exemplified by this very case. I would favor a rule which would recognize the availability of equitable protection upon application to a superior court.

I am authorized to state that Justice Bell joins in this special concurrence.

IN THE SUPREME COURT FOR THE STATE OF GEORGIA

William Daniel O'Kelley, Donna O'Kelley Kilgore, and Patricia Williams, as mother and next friend of Carol Ann O'Kelley and Christopher Todd O'Kelley, minors,	)	
Appellants	)	Appeal No. 43854
v.	)	
Hospital Authority of Gwinnett County, d/b/a Gwinnett Ambulance Service, Metro Ambulance Services, Inc., Carlson Southeast Corp., Esther Reifman,	)	
Appellees	)	

MOTION FOR STAY OF REMITTITUR

The Appellants in the above-captioned case move this honorable Court for a stay of remittitur to perfect a direct appeal to the United States Supreme Court and they show the following grounds in support of this motion:

1. This case involved an attack on the validity of the Georgia wrongful death statute, OCGA §51-4-2, on federal constitutional grounds.

2. The decision of this Court, dated October 29, 1986, rejected Appellants' pro-

cedural due process challenge and ruled that the procedural safeguards available to protect the interests of the children were adequate.

3. The adequacy of procedural safeguards is always a matter of judicial determination under federal procedural due process standards and in Appellants' view the Georgia wrongful death statute is invalid based on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

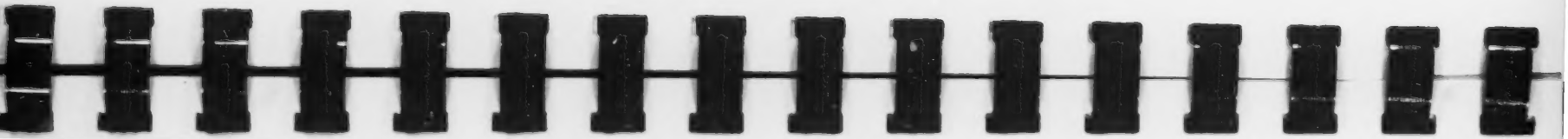
4. Appellants have the right to proceed by direct appeal to the United States Supreme Court based on 28 U.S.C. §1257(2).

5. Appellants believe that this case presents a substantial question warranting review by the Supreme Court.

Respectfully submitted,

/s/

Albert M. Pearson
Counsel for Appellants



CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party with a copy of the "MOTION FOR STAY OF REMITTITUR" by depositing the same in the U.S. Mail with sufficient postage thereon to insure delivery and addressed as follows:

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Suite 100
Decatur, GA 30032

DATED: November 7, 1986

/s/
Albert M. Pearson

43854

SUPREME COURT OF GEORGIA

Atlanta, November 14, 1986

The Honorable Supreme Court met pursuant to adjournment.

BY: Smith, J.

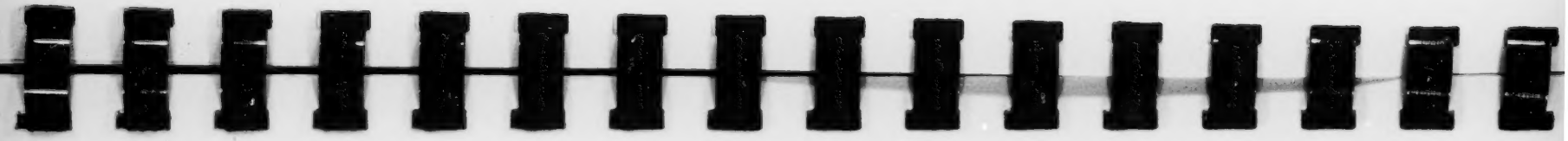
The following direction was given:

WILLIAM DANIEL O'KELLEY ET AL. V. HOSPITAL AUTHORITY OF GWINNETT COUNTY d/b/a GWINNETT AMBULANCE SERVICE ET AL.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 10-29-86 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court



not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/
Justice George T. Smith

IN THE SUPREME COURT FOR THE STATE OF GEORGIA

Appeal No. 43854

WILLIAM DANIEL O'KELLEY, DONNA O'KELLEY KILGORE, and PATRICIA WILLIAMS, as mother and next friend of CAROL ANN O'KELLEY and CHRISTOPHER TODD O'KELLEY, minors,

Appellants

v.

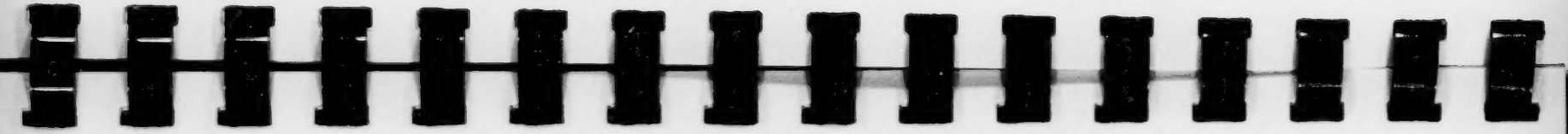
HOSPITAL AUTHORITY OF GWINNETT COUNTY, d/b/a WINNETT AMBULANCE SERVICE, METRO AMBULANCE SERVICES, INC., CARLSON SOUTHEAST CORP., ESTHER REIFMAN,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that William Daniel O'Kelley, etc., the Appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Georgia, affirming the trial court's grant of summary judgment, entered in this action on October 29, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).



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CERTIFICATE OF SERVICE

I certify that I have this day served counsel for the Appellees as listed below with a copy of the foregoing "NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES" by depositing the same in the U.S. Mail, first-class, with sufficient postage thereon to insure delivery:

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Atlanta, GA 30357

Dated: January 27, 1987

Albert M. Pearson, III

IN THE PROBATE COURT OF GWINNETT COUNTY

STATE OF GEORGIA

IN THE ESTATE OF :

WILLIAM HAROLD O'KELLEY : CASE NO. 12176

ORDER

The above-styled case coming before this Court on the May 21st, 1986, the Court finds as follows:

STIPULATION OF FACTS

Daisy O'Kelley, Widow of the deceased, and appointed administratrix on August 5th, 1985 by Probate Court and re-affirm the appointment of Administratrix on November 25th, 1985 by Superior Court Judge, Reid Merritt.

WHEREFORE, on March 31, 1986, William Daniel O'Kelley, Donna O'Kelley Kilgore and Patricia Williams, as mother and next friend of Carol Ann O'Kelley and Christopher Todd O'Kelley, minors, filed a Petition for Co-Administrator on the Estate to this Honorable Court. The hearing being set for May 21st, 1986.

FINDING OF FACTS AND CONCLUSIONS OF LAW

The Court finds that Daisy Harris O'Kelley, administratix, having filed the inventory on May 21, 1986 -- 3 Months late, according to Miche Code 53-7-75. Daisy Harris O'Kelley also testifying this was the inventory at the time she and William Harold O'Kelley married in 1979 and is not the true inventory at the time of death. By virtue of the official code of Georgia annotated (Miche), section 53-7-75, gives the Probate Judge the right to remove the Administratrix. The Court after hearing other testimony, finds there is much distrust in the parties and feel it would be in the best interest of the estate to remove the Administratrix and appoint the County Administrator, Hon. H. Rhodes Jordan, as the Administrator of the estate of William Harold O'Kelley.

IT IS THEREFORE ORDERED BY THIS COURT that Daisy Harris O'Kelley be removed and Hon. H. Rhodes Jordan be appointed to serve as Administrator by him taking the Oath of Administrator.

IT IS SO ORDERED, this 27th day of May, 1986.

/s/
Sue T. Williams, Probate Judge
Gwinnett County Probate Court